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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA,
CARSON-TRUCKEE WATER CONSERVANCY DISTRICT
and SIERRA PACIFIC POWER COMPANY, a corporation,
Petitioners,

v.

WILLIAM P. CLARK, Secretary of the Interior, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Endangered Species Act directs the Secretary of the Interior to *restore* listed species to their original population by converting resources authorized under various reclamation statutes, thus repealing by implication those statutes, where the congressional will expressed in the reclamation statutes and in the Endangered Species Act can be simultaneously accommodated in a way that will not *jeopardize* any endangered or threatened species.

2. Whether the Washoe Project Act and related federal reclamation laws obligate the Secretary of the Interior to obtain reimbursement for any Stampede Dam waters not required to avoid jeopardizing the endangered and threatened species in Pyramid Lake.

LIST OF PARTIES *

Petitioners, plaintiffs-appellants in the United States Court of Appeals for the Ninth Circuit, are the State of Nevada, the Carson-Truckee Water Conservancy District and the Sierra Pacific Power Company. Respondents, defendants-appellees in the Ninth Circuit, are the Secretary of the Interior, the Commissioner of the Bureau of Reclamation, and the Regional Director, Mid-Pacific Region, Bureau of Reclamation. The defendant-intervenor-appellee in the Ninth Circuit was the Pyramid Lake Paiute Tribe of Indians, also a respondent before this Court.

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* Pursuant to Rules 21.1(b) and 28.1 of this Court, petitioners inform the Court that Sierra Pacific Power Company is a subsidiary of Sierra Pacific Resources, which has two additional subsidiaries—Lands of Sierra, Inc., and Sierra Energy Company. Valmy 2 Construction Company is the subsidiary of Sierra Pacific Power Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Memorandum Decision of the United States District Court for the District of Nevada, dated August 27, 1979, is not reported but is printed as Appendix B hereto. The opinions of the District Court dated February 16, 1982, and October 4, 1982, are reported at 537 F. Supp. 106 and 549 F. Supp. 704 and are printed as Appendices C and D hereto.[1] The decision of the United States Court of Appeals for the Ninth Circuit from which certiorari is sought, dated August 22, 1984, affirming in part and vacating in part the decisions of the District Court, is reported at 741 F.2d 257 and appears as Appendix A hereto.

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[1] The District Court also entered an opinion, not at issue here, dated September 9, 1983, and appearing at 575 F. Supp. 467, which held that the Pyramid Lake Paiute Tribe of Indians (the "Tribe") is not entitled to costs and attorney fees.

JURISDICTION

The Court of Appeals' decision in the case at bar was rendered on August 22, 1984 (App. 1a), affirming in part and vacating in part the decisions of the District Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

Petitioners rely on the Endangered Species Act, 87 Stat. 884, as amended, 16 U.S.C. §§ 1531 *et seq.*, and the Washoe Project Act of 1956, 70 Stat. 775, as amended, 43 U.S.C. §§ 614-614d, which are reprinted as Appendices I and J hereto. Petitioners also rely upon the Reclamation Project Act of 1939. 43 U.S.C. § 485h(a):

> (a) Findings of Secretary
>
> No expenditures for the construction of any new project, new division of a project, or new supplemental works on a project shall be made, nor shall estimates be submitted therefor, by the Secretary until after he has made an investigation thereof and has submitted to the President and to the Congress his report and findings on—
>
> (1) the engineering feasibility of the proposed construction;
>
> (2) the estimated cost of the proposed construction;
>
> (3) the part of the estimated cost which can properly be allocated to irrigation and probably be repaid by the water users;
>
> (4) the part of the estimated cost which can properly be allocated to power and probably be returned to the United States in net power revenues;
>
> (5) the part of the estimated cost which can properly be allocated to municipal water supply

or other miscellaneous purposes and probably be returned to the United States.

If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations to irrigation, power, and municipal water supply or other miscellaneous purposes found by the Secretary to be proper, together with any allocation to flood control or navigation made under subsection (b) of this section, equal the total estimated cost of construction as determined by the Secretary, then the new project, new division of a project, or supplemental works on a project, covered by his findings, shall be deemed authorized and may be undertaken by the Secretary. If all such allocations do not equal said total estimated cost, then said new project, new division, or new supplemental works may be undertaken by the Secretary only after provision therefore has been made by Act of Congress enacted after the Secretary has submitted to the President and the Congress the report and findings involved.

STATEMENT OF THE CASE

The Truckee River and its tributaries are the principal source of water for the cities of Reno and Sparks, Nevada, and surrounding areas. Because the annual precipitation in this region can vary substantially from year to year, the Reno Sparks area experiences periodic dry cycles when, at times, there is no water in the Truckee to satisfy the bulk of the water rights held for the area's water supply. The solution to this recurrent problem is to build reservoirs to store water from wet years for use during dry years.

Recognizing the need to secure a reliable and adequate water supply for use in western Nevada during the periodic dry cycles, Congress enacted the Washoe Project Act, 70 Stat. 775, 43 U.S.C. §§ 614-614d, App. 145a, in 1956. That Act authorized the construction of Stampede

Dam and Reservoir ("Stampede") on the Little Truckee River, a tributary which enters the Truckee in California. The water stored in Stampede was intended by Congress and the sponsors of the Act to be used mainly for reimbursable purposes such as irrigation, power generation, and municipal, industrial and domestic ("M&I") water supply. Such uses are called reimbursable in reclamation law because the users must enter into repayment contracts with the Bureau of Reclamation to repay the Reclamation Fund their share of the construction, operation, and maintenance costs of the Project. The Carson-Truckee Water Conservancy District (the "District"), a petitioner herein, was organized under state law in 1958 for the express purpose of buying Stampede water. The District negotiated a repayment contract with the Bureau of Reclamation, but it has never become final because the Secretary has refused to execute it.

Construction of Stampede was started in 1966 and completed in 1970. Since then, the Secretary has refused to sell any of Stampede's water. Instead, he has released that water in the spring in order to restore two species of fish that are found in Pyramid Lake, at the terminus of the Truckee River. The cui-ui is a sucker fish that was listed as endangered in 1967. It is found only in Pyramid Lake. 32 Fed. Reg. 4001 (1967). The Lahontan cutthroat trout, which is found in more than 50 rivers, streams and lakes in Nevada, California, Utah and Washington, was originally listed as endangered, but was upgraded to threatened status in 1975. 40 Fed. Reg. 29,863 (1975).

Pyramid Lake's population of these species declined between 1915 and 1940 because the spawning runs were blocked. The blockage was partly due to a delta that was formed at the mouth of the Truckee from the refuse of upstream sawmills. The situation was exacerbated by the diversion of a large portion of the flow of the Truckee to the Newlands Reclamation Project in the Carson River basin and by the prolonged drought of the 1920's and

1930's. Unable to spawn, the Lahontan cutthroat trout disappeared from the Lake. The cui-ui population declined, but the species was able to survive by spawning in the delta and in other creeks tributary to Pyramid Lake.

Since the 1950's, however, there have been several significant improvements for the fish. First, the Truckee-Carson Irrigation District has cut back its diversions from the Truckee River. Most significantly, it no longer diverts water for single-purpose hydroelectric power. Second, the Secretary has constructed several major facilities designed to improve spawning, including the Pyramid Lake Fishway, which was designed to allow fish to migrate past the delta, and Marble Bluff Dam, which regulates water flows down the Fishway. Additionally, the Secretary built a fish-trapping facility, a Lahontan cutthroat trout hatchery at Marble Bluff, and another fish ladder several miles upstream. Fourth, a cui-ui hatchery has been established on the Pyramid Lake Paiute Indian Reservation, and in the past ten years more than 12 million cui-ui have been planted in Pyramid Lake. Through these facilities, the cui-ui spawning runs are being revitalized. Pyramid Lake has been restocked with Lahontan cutthroat trout, and millions of fry have been raised at hatcheries and released in Pyramid Lake.

In the late 1970's, the Secretary prepared the Cui-ui Recovery Plan, which was approved by the Fish and Wildlife Service in 1978. The Plan recommends that the Secretary take actions to restore the shade canopy along the lower Truckee, to improve the river channel, and to transplant the cui-ui. Lowering the water temperature through the use of the shade canopy would reduce the volume of flows that would be released by the Secretary. Channel modification would also reduce water temperatures and provide migrating fish with deep pools in which to rest during the hotter part of the day. Transplantation of the cui-ui would strengthen the cui-ui's long-

term chance for survival. The Cui-ui Recovery Team has estimated the cost of these restorative measures at $605,000.

None of these recommendations has ever been adopted or implemented by the Secretary. Instead, the Secretary has converted Stampede, a reclamation project reservoir, into a recovery program for the cui-ui and Lahontan cutthroat trout. Rather than plant shade trees along the Truckee's banks, the Secretary has released up to six times the normal river flow to reduce water temperatures at Marble Bluff, 75 miles downstream.

The Secretary has not consulted the Fish and Wildlife Service, as required by Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, to determine how much water could be sold from Stampede without jeopardizing the continued existence of the cui-ui and Lahontan cutthroat trout. Instead, he has operated Stampede solely for the promotion of these species to the exclusion of the other purposes underlying the Washoe Project Act.

The District, Sierra Pacific Power Company, and the State of Nevada filed their Complaint in the instant action in the United States District Court for the District of Nevada in August 1976 and subsequently amended their Complaint in October 1976. The Plaintiffs' Amended Complaint sought declaratory relief, mandamus, and an order compelling the Secretary to sell a portion of Stampede's water to the District for M&I purposes and requiring him to obtain a water permit from the Nevada State engineer. The Tribe intervened as a defendant in late 1976. The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1337, and 1361, and 5 U.S.C. §§ 702, 704, and 706.

The District Court bifurcated the issues in the case. In its first opinion, *Carson-Truckee Water Conservancy District* v. *Watt*, 537 F. Supp. 106 (D. Nev. 1982) (*"Carson-Truckee I"*) (App. 23a), the court held that (1) petitioners had standing to challenge the Secretary's

refusal to sell water for reimbursable purposes; (2) petitioners had a private right of action under the reclamation laws; (3) the Secretary was obligated to sell any excess Stampede water after fulfilling his obligations under the Endangered Species Act and the Tribe's reserved water rights; and (4) no Nevada permit was required for Stampede's current operations. App. 36a.

In its second decision, *Carson-Truckee Water Conservancy District* v. *Watt*, 549 F. Supp. 704 (D. Nev. 1982) (*"Carson-Truckee II"*) (App. 37a), the court ruled that under the Endangered Species Act "the Secretary is required to give the Pyramid Lake fishery priority over all other purposes of Stampede until the cui-ui fish and Lahontan cutthroat trout are no longer classified as endangered or threatened." App. 46a.

On appeal, the Ninth Circuit Court of Appeals affirmed in part and vacated in part the District Court's rulings. *Carson-Truckee Water Conservancy District* v. *Clark*, 741 F.2d 257 (9th Cir. 1984); App. 1a. The Court of Appeals vacated the lower court's ruling in *Carson-Truckee I* that the Washoe Project Act requires the Secretary to sell all water from Stampede after fulfilling his obligations under the Endangered Species Act and the Tribe's reserved water rights.[2] App. 5a. The court construed the Washoe Project Act as merely prohibiting the Secretary from delivering project water for reimbursable purposes without first obtaining a repayment contract. The Act, according to the court, imposes no affirmative obligation to sell the Stampede waters. App. 5a. The Ninth Circuit affirmed the District Court's ruling in *Carson-Truckee II* that the Endangered Species Act required the Secretary to give priority to the fish over all other purposes of the Washoe Project Act until such time as the cui-ui and Lahontan cutthroat trout are no

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[2] The question of the Tribe's claimed reserved water rights was not reached by the lower courts and thus is not an issue in this case. Those rights were ultimately determined by this Court in *Nevada* v. *United States*, 103 S.Ct. 2906 (1983).

longer listed as endangered or threatened with extinction. App. 8a.

ARGUMENT

The Ninth Circuit in this case required the Secretary of the Interior to use all projects under his jurisdiction for the exclusive purpose of restoring the endangered and threatened species to their historical population levels. Nothing in the Endangered Species Act, its legislative history, or this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), justified such a sweeping holding, which commanded the Secretary to ignore totally the congressional mandate of the Washoe Project Act and, by inference, all other reclamation acts with similar provisions. Because the dangerous implications of the Ninth Circuit's reasoning extend far beyond the factual scenario of the instant case, the writ of certiorari should be granted and the Court of Appeals' decision reversed.

1. The Endangered Species Act Does Not Compel the Secretary To Ignore His Duties Under Pre-Existing Statutes Where The Endangered Species Act And The Pre-Existing Statutes Can Be Simultaneously Accommodated.

The Ninth Circuit ruled that the Secretary has an affirmative duty under the Endangered Species Act to restore the Pyramid Lake fish to the point where they no longer merit protection, even if this requires the Secretary to use all of the water not only from Stampede but, presumably, from all other reclamation projects in the area. According to the Court of Appeals, the command of the Endangered Species Act is mandatory, and it is not merely to insure that the Secretary's operation of Stampede does not jeopardize the cui-ui and Lahontan cutthroat trout but rather to restore them at the expense of the primary purpose of the Washoe Project Act. In effect, the Ninth Circuit ruled that Congress repealed the Washoe Project Act by implication when it enacted the Endangered Species Act.

The method by which the Court of Appeals reached its conclusion required a convoluted reading of the Endangered Species Act. The court relied upon four sections of the Act: Sections 2(b) and (c), 3(3) and 7(a)(1). Essentially, Sections 2(b) and (c) recite that the Act provides a means for conserving ecosystems and a program for conserving listed species—end results that all federal agencies should "seek" to accomplish. Section 7(a)(1) provides that the Secretary and all federal agencies shall "utilize their authorities in furtherance of the purposes of this chapter." These general provisions clearly do not require the drastic result reached below. However, the Ninth Circuit then turned to the definitional portion of the Act, Section 3(3), which defines "conserve" and its derivatives in terms of using all methods and procedures "which are necessary" to bring endangered and threatened species "to the point at which the measures provided pursuant to this chapter are no longer necessary."

In other words, the Court of Appeals reasoned that the definition of "conserve" requires that all steps be taken so that the Act's "measures" are no longer necessary, which the court thought was tantamount to requiring that all endangered and threatened species be restored to historic levels. And because the Secretary is directed to use his authority to "conserve," this means that for the indefinite future he must take whatever steps are necessary not just to preserve these species but to bring them back to their original condition, no matter how far in the past that condition may have existed and no matter how his steps may directly conflict with other congressional mandates. This stringing together of assumptions from various parts of a statute, with ultimate authority resting upon a one-sentence definition of one word, is a strange and tortured way to repeal by implication a line of reclamation statutes stretching back over 80 years. Additionally, it totally fails to take into account the ameliorative language of Section 7(a)(2),

which speaks not of restoring or rehabilitating a species but of not jeopardizing its continued existence.

A more logical reading of the statute--one that would construe the Endangered Species Act so as not to repeal reclamation laws enacted both before and after that Act—is that the Secretary must not do anything to jeopardize or destroy any listed species but that he cannot use a project authorized for reclamation purposes to rehabilitate such a species in the face of countervailing congressional directives contained in the reclamation statute. Thus, in this case the Secretary must first insure, through the consultation process outlined in Section 7 of the Endangered Species Act, that his operation of Stampede will not be likely to jeopardize the continued existence of the listed species in Pyramid Lake. The consultation process may reveal that a certain level of water flow is necessary to avoid jeopardizing the fish.[3] But after this original goal is fulfilled, the Secretary must use the remaining water as Congress has otherwise directed—in this instance, to obtain reimbursement for the outlays Congress approved for the Washoe Project.[4]

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[3] The Court of Appeals affirmed the District Court's holding that petitioners' proposed alternative plan would jeopardize the fish and that the Secretary had not abused his discretion in rejecting that plan. App. 10a. The point of petitioners' alternative plan was merely to illustrate one way in which the competing water needs could be reconciled. It does not follow from the lower court's holding that there is no reasonable and prudent alternative to using all the water to restore the fish. The competing needs must be reconciled through the consultation process, which the Secretary has yet to initiate.

Moreover, the Secretary has never contended that he needs all the water to avoid jeopardizing the fish. His contentions are based, instead, on the creation of *optimal* spawning conditions for the restoration of the fish.

[4] In an analogous area the District of Columbia Circuit held that the National Environmental Policy Act may permit temporary postponement of the enforcement of other federal statutes, but does not allow the repeal of those statutes *sub silentio* at the administrative level. *National Audubon Society* v. *Watt*, 678 F.2d 299 (D.C. Cir. 1982).

There is another construction of the Endangered Species Act that even more directly reconciles the two statutes at issue here. It is not at all clear that Section 7(a)(1) of the Act, which directs the Secretary to utilize his "authorities" in furtherance of the Endangered Species Act's purposes, empowers (much less directs) the Secretary to convert Stampede into a restoration project. The Secretary's "authorities" are circumscribed by the limits defined by Congress, which was well aware of the need to protect the fish in Pyramid Lake when it enacted the Washoe Project Act in 1956. To that end, Congress directed the Secretary to construct a fish hatchery for restoration of the Pyramid Lake fishery, the Marble Bluff Dam to regulate fish flows in the lower Truckee, and the Pyramid Lake Fishway. The Washoe Project Act, however, specifically limited the expenditures for these purposes to $2 million out of a total project budget of $52 million. 43 U.S.C. §§ 614(c)-614(d); App. 149a. Thus, Congress has already defined what "authorities" the Secretary may utilize for restoration of the Pyramid Lake fishery, and these "authorities" are the ones that the Secretary is required to utilize under the Endangered Species Act. The Secretary has spent $7.9 million to build the Marble Bluff Dam and the Pyramid Lake Fishway and, thus, has already utilized the "authorities" given to him by Congress to restore the fish. Nothing in the Washoe Project Act or the Endangered Species Act gives the Secretary additional "authorities" to convert Stampede into a restoration project.

The Ninth Circuit's decision is based upon a fundamental misreading of *TVA* v. *Hill*. In that case, there were two options open to TVA: to complete the Tellico Dam or not to complete it. If the Dam were not built, nothing at all would happen to the snail darter; if it were built, the snail darter would be totally destroyed. Therefore, there was an "irreconcilable conflict" between

the two options, 437 U.S. at 193, and pursuant to the plain language of Section 7 of the Endangered Species Act, this Court held that the snail darter must be protected.

In this case, there are also two options open to the Secretary, but they are of an entirely different nature: to use all of Stampede's water to restore the fish by attempting to create perfect spawning conditions, or to use part of the water to maintain the species while the rest of the water is used for the statutorily-mandated reimbursable purposes that lie at the heart of the Washoe Project Act. Here, there is no question whatever of the fish being destroyed. Neither option will result in such destruction. There is thus no irreconcilable conflict in the case. The only issue is how to define the Secretary's duty toward the fish under the Endangered Species Act where he is faced with countervailing congressional directives and has alternative means at his disposal to restore the species.

While the Endangered Species Act requires alteration of an agency's ongoing project in the case of an irreconcilable conflict unless an exemption is granted, this Court's ruling in *TVA* v. *Hill* clearly implied that an agency could not forego its congressionally mandated mission unless the Secretary had determined through the consultation process that the agency's action might jeopardize the continued existence of a listed species. *Id.* at 182-185. No consultation has taken place in the case at bar. What the Ninth Circuit failed to recognize is that this case presents the question of competing, but not irreconcilable, congressional mandates.

When two congressional enactments are "capable of co-existence," each must be regarded as effective. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). In noting that "Congress foresaw that § 7 would, *on occasion*, require agencies to alter ongoing projects in order to ful-

fill the goals of the Act," *TVA* v. *Hill*, 437 U.S. at 186 (emphasis added), this Court acknowledged that reconciliation of the Endangered Species Act with other congressional directives is possible in many instances. Thus, the Secretary may not abandon the purposes expressed in the Washoe Act unless he determines through the consultation process that the operation of Stampede for those purposes is "likely to jeopardize the continued existence" of the cui-ui and the Lahontan cutthroat trout.

Coverting Stampede into a restoration project for the Pyramid Lake Fishery has had a direct impact on the ability of the area to contend with drought conditions and on the potential for future growth in Truckee Meadows. Because Nevada receives so little precipitation, local government must plan future growth so that the demand for water does not exceed the available supply in critically dry years. Accordingly, no new development for Truckee Meadows can be approved unless the applicant has obtained a commitment from Sierra Pacific Power Company that it has adequate water supplies to provide service. Because the Secretary is presently prohibited from selling M&I water to the District, Sierra Pacific has been unable to meet its service commitments. The waiting list for these commitments contains more than 130 applications that cannot be filled, which represent over 7000 residential units and several industrial parks and hotels.

The conversion of Stampede also will affect the Stampede Powerplant, which is currently under construction and is scheduled to be completed in the fall of 1985. If the Ninth Circuit's decision stands, the Bureau of Reclamation estimates that the Powerplant will produce 5,620,000 kilowatthours per year, which "represents the minimum power generation alternative," at an estimated repayment cost of 67.6 mills per kilowatthour.

49 Fed. Reg. 39,099 (1984).[5] If, on the other hand, the Secretary sells M&I water to the District, power production will be enhanced to an estimated 14,700,000 kilowatthours per year at 25.9 mills per kilowatthour. *Id.*

But the Ninth Circuit's decision is not limited to the facts in the case at bar. Dozens of existing reclamation projects cover the western States, many of which fall within the Ninth Circuit's territorial jurisdiction. That court's decision will almost certainly require the Secretary to abrogate the congressional directives associated with these projects until such time as the listed species in these areas no longer need protection under the Endangered Species Act—in many cases, indefinitely.[6]

In its latest quarterly tabulation of water service and repayment contract negotiations, the Bureau of Reclamation lists 93 negotiations taking place in July-September 1984. 49 Fed. Reg. 30,801 (1984). These projects alone account for millions of dollars recouped each year through repayment contracts. Not only would the Ninth Circuit's decision prevent finalization of these contracts and compel the unilateral abrogation of existing repayment contracts and privately owned water rights, thus resulting in tremendous budgetary losses and subjecting the government to numerous breach of contract actions, but it would also totally preclude the use of water for irrigation and M&I uses. Instead, the resources would be spent solely on listed species that,

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[5] The Bureau has announced its intention of giving 2,000,000 kilowatthours per year free of charge to the Lahontan National Fish Hatchery and the Marble Bluff fish facility. Thus, under the existing operation of Stampede, the amount of commercially available hydroelectric power would be minimal. Moreover, because providing power to the fisheries represents a non-reimbursable function, the cost could not be recouped by charging other users.

[6] The Secretary continues to list many new species under the Act. *E.g.*, 49 Fed. Reg. 28,583 (1984). Even projects not presently affected by a listed species may soon be impacted.

in many instances, have never been placed in jeopardy by the operation of these projects. Population growth in the western States is often directly tied to the availability of water from these projects, and any conversion to restoration purposes would violate this historical reliance.

The proposed Narrows Unit Project, which is to be located on the South Platte River in northeastern Colorado, illustrates the difference between the jeopardization standard required by the Endangered Species Act and the standard applied by the Ninth Circuit. The Project, like Stampede, is designed to provide flood control, irrigation, M&I water, fish and wildlife development, and recreation. The Fish and Wildlife Service has issued a biological opinion concluding that the Narrows Unit Project, as proposed, is likely to jeopardize the continued existence of the whooping crane, an endangered species, and adversely modify a 53-mile stretch of the Platte River in Nebraska (approximately 195 miles downstream from the Project), which is a critical habitat for the cranes. Fish and Wildlife Service, U.S. Dep't of Interior, Narrows Unit Biological Opinion—Whooping Crane 2 (Jan. 20, 1983). Pursuant to Section 7(b) of the Endangered Species Act, the Fish and Wildlife Service recommended "reasonable and prudent alternatives" to the proposed operation of the Narrows Project. The Service's alternative would require the Narrows Unit Reservoir to provide supplemental flows for the crane's roosting habitat and for channel width maintenance. These supplemental flows—the amount needed to insure that the cranes are not jeopardized—represent approximately one-third of the Reservoir's yield, leaving the remainder to be used for the Project's original purposes. The Endangered Species Act contemplates precisely this type of consultation process through which the competing water uses can be reconciled. However, under the lower court's ruling here, the Secretary

would be directed to use the Reservoir's *entire* yield to restore the crane, instead of the level needed to insure that the cranes will not be jeopardized. An accommodation of the Endangered Species Act and the Narrows Project would fulfill the objects of *both* statutes, while the Ninth Circuit's ruling would frustrate the congressional directives underlying the Narrows Project.[7]

Because all other federal agencies are under the same obligation as the Secretary to "utilize their authorities in furtherance of the purposes" of the Endangered Species Act, 16 U.S.C. § 1536(a)(1), the Ninth Circuit's ruling applies to all agencies and directs them to ignore their primary missions even though no jeopardization of listed species is involved.[8] The water flows

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[7] The Narrows Unit Project is just one of many projects affected by the Court of Appeals' ruling. Other projects that face similar problems include Ruedi Reservoir, Green Mountain Reservoir and the Fontenelle Dam, which are within the Colorado River Storage Project area. Under the Ninth Circuit holding, the Secretary now has free reign over any reclamation project that might have an impact on endangered or threatened species. His discretion is unlimited, his only mission is to restore the species, and he may ignore existing congressional directives to do otherwise. Such a tortured reading of the Endangered Species Act could not have been intended by Congress.

[8] For example, in deliberations over the enactment of the Endangered Species Act, Representative Dingell, the House manager of the bill, discussed Air Force target bombing along the gulf coast of Texas that threatened whooping cranes. According to Representative Dingell, Section 7 would require the Secretary of Defense to take steps to eradicate the threat. 119 Cong. Rec. 42,913 (1973). Under the Ninth Circuit's holding here, however, the Secretary of Defense would be required to go much further than insuring that the Air Force's target practice would not jeopardize the cranes. Instead, he would have to convert the primary mission of the Air Force from national defense to the restoration of whooping cranes. Congress could not have intended such an implausible result. In the 1978 amendments to the Endangered Species Act, Congress implicitly rejected the Ninth Circuit's reasoning by granting the Secretary of Defense the power to exempt agency actions from the

created through construction and operation of federal reclamation projects are resources that are available for use by the Secretary only because Congress sought to provide for reclamation objectives such as flood control, irrigation, and M&I use. These flows cannot be guaranteed or controlled without the creation of massive dams and reservoirs to harness them. Therefore, where there is no claim of jeopardization, directing the Secretary to ignore the purposes for which these projects were constructed is akin to directing other federal agencies to use their appropriated funds for purposes other than those authorized by Congress.

Only one example of the pernicious ramifications of the lower court's decision is the chaos that would result if federal highway funds were impounded for restoration purposes. In the Federal-Aid Highway Act, 23 U.S.C. §§ 101 *et seq.*, Congress created the National System of Interstate and Defense Highways, deeming this system of "primary importance to the national defense" and "essential to the national interest." 23 U.S.C. § 101 (b). Budget authority in fiscal 1983 for highways alone was $13.2 billion. If the Ninth Circuit's ruling stands, the congressional goal of revitalizing this country's transportation infrastructure will never be reached because the Secretary of Transportation will be required to utilize federal highway funding solely for the restoration of listed species.[9]

Act when necessary for reasons of national security. 16 U.S.C. § 1536(j).

The quandry is a real one. *See Wash. Post*, Oct. 30, 1984, at A10, col. 5 (proposed $250 million Army National Guard training site may have to be abandoned because of two species of endangered bats).

[9] The Fifth Circuit Court of Appeals has ruled that the Secretary of Transportation's duties under the Endangered Species Act *can be reconciled* with the primary obligations of the Department of Transportation. *National Wildlife Federation* v. *Coleman*, 529 F.2d 359 (5th Cir.), *cert. denied sub nom. Boteler* v. *National Wildlife*

The Secretary of Agriculture's duty under the Multiple Use, Sustained Yield Act of 1960, 16 U.S.C. §§ 528-529, to develop the renewable resources of the national forests provides another example of the far-reaching implications of the Ninth Circuit's decision. The Forest Service, an agency of the Department of Agriculture, oversees the harvesting of thousands of acres of timber each year, and its activities are constantly monitored by environmental groups for violation of the Endangered Species Act and other environmental legislation.[19] The Forest Service is presently able to pursue the balanced multiple use of our national forests in a manner that protects pristine wilderness areas and insures the continued protection of listed species. The Ninth Circuit's decision in the case at bar repeals the congressionally expressed policy of multiple use and would require the Forest Service to manage the forests for one purpose only —restoration of listed species to their historical quotient.

When it enacted the Endangered Species Act, Congress emphasized the priority of halting and reversing the trend of losing endangered species to extinction. As pointed out above, this Court noted in *TVA* v. *Hill* that Section 7 would, "*on occasion*" (*i.e.*, where a conflict occurs), require an agency to alter an ongoing project. 437 U.S. at 186 (emphasis added). But where there is no conflict between an agency's primary mission and the continued existence of a listed species, a federal agency

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Federation, 429 U.S. 979 (1976). Federal agencies, according to the Fifth Circuit, are required by the Endangered Species Act to take "all necessary action to insure that [their] actions will not jeopardize the continued existence of an endangered species or destroy or modify habitat critical to the existence of the species." 529 F.2d at 371. The Fifth Circuit's holding delineated the affirmative scope of an agency's duty under the Endangered Species Act in a manner consistent with the agency's primary mission and directly at odds with the duty mandated by the Ninth Circuit.

[19] *See, e.g.*, Peterson, *Plan to Put Logging Roads in Wild Areas Is Challenged, N.Y. Times*, Oct. 31, 1984, at A12, col. 1.

should have neither the duty nor the discretion to ignore the primary directive given to it by Congress. Thus, while the Secretary must insure that his operation of Stampede is not likely to jeopardize the cui-ui and the Lahontan cutthroat trout, he cannot otherwise ignore the purposes of the Washoe Project Act.

No other Circuit has ruled that federal agencies have a duty to utilize their authorities and resources for the restoration of listed species to the detriment of their primary missions. The courts that have reached the issue have required agencies to insure that their actions will not *jeopardize* listed species, thus establishing a conflict in principle with the Ninth Circuit.[11]

The implications of the Ninth Circuit's decision stretch far beyond Stampede Dam or any other reclamation

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[11] *See, e.g., Roosevelt Campobello Int'l Park Comm'n* v. *Environmental Protection Agency*, 684 F.2d 1041, 1052 (1st Cir. 1982); *North Slope Borough* v. *Andrus*, 642 F.2d 589, 607 (D.C. Cir. 1980); *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1303-04 (8th Cir. 1976); *National Wildlife Federation* v. *Coleman*, *supra*.

To buttress its reasoning in *Carson-Truckee II*, the District Court relied on two other District Court cases involving hunting regulations promulgated by the Secretary of the Interior. *See Connor* v. *Andrus*, 453 F. Supp. 1037 (W.D. Tex. 1978); *Defenders of Wildlife* v. *Andrus*, 428 F. Supp. 167 (D.D.C. 1977). In *Defenders of Wildlife*, the court ruled that the Secretary, when issuing hunting regulations, must act to increase the population of protected species. *Id.* at 170. Central to the District Court's reasoning was legislative history "that Congress considered hunting regulations among the more important weapons in the fight to save vanishing species of wildlife." *Id.* Congress clearly intended that such regulations be used affirmatively to restore endangered species. It by no means follows that a reclamation project enacted for purposes having little connection with fish and wildlife conservation may be converted into an affirmative restorative tool at the Secretary's discretion.

Connor also dealt with hunting regulations. The District Court invalidated a proposed ban on duck hunting in certain areas because the record failed to support a finding that the hunting ban would benefit the ducks and even indicated that the ban would have an adverse impact on the ducks' critical habitats.

project. The ruling requires all federal agencies to effectuate the purposes of the Endangered Species Act by utilizing their funds and other resources to restore listed species, without regard to (1) the agency's primary mission and (2) whether the agency's action would have otherwise jeopardized the species. Petitioners submit that, where the agency action will not jeopardize the species, the agency's primary mission should remain undisturbed. Congress intended that agencies defer to the Endangered Species Act only where such conflicts arise. This case thus assumes unique importance because it will determine the proper scope of an agency's affirmative duties under the Endangered Species Act where there is no conflict between the Act and the agency's primary mission—a question not squarely addressed by this Court in *TVA* v. *Hill* or any other case, but one demanding prompt review because of its extraordinary implications.

2. Federal Reclamation Laws Require the Secretary to Obtain Reimbursement for Stampede Dam Waters Not Needed to Meet His Obligations Under the Endangered Species Act.

In the earlier stages of this litigation, the Secretary and the Tribe contended that the Washoe Project Act imposed no obligation on the Secretary to seek reimbursement for the Project's construction and operation costs. On cross-motions for summary judgment, the District Court ruled in favor of petitioners, holding that it is "clear in light of the statute's background that Congress intended the imperative 'shall' [in the last sentence of 43 U.S.C. § 614a(c)] to compel the Secretary to execute a cost reimbursement contract with the District." App. 18a. After the trial, however, Judge Solomon advised the parties that he considered the issue open for discussion. In his post-trial brief, the Secretary *conceded* that the reclamation laws imposed the duty to seek reimbursement and that he is authorized to sell Stampede water for M&I

purposes. Judge Solomon treated these concessions as dispositive. App. 34a.[12]

The Ninth Circuit's ruling that no reimbursement obligation exists[13] fundamentally misconstrued the Washoe Project Act and federal reclamation law in general. The Washoe Project Act provides that the construction, operation, and maintenance of Stampede are to be governed by the federal reclamation laws. 43 U.S.C. § 614(a). To determine the extent of the Secretary's obligation to seek reimbursement for Stampede's costs, the Court of Appeals should have "looked to the provisions of the whole law and to its object and policy," *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975), and construed the statutory scheme in the manner that best effectuates congressional intent. *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 386 (1948).

Early in this century the reclamation laws emerged from the need to reclaim arid portions of western lands for development. The massive cost of harnessing scarce water resources was too great for private interests and state governments. In response to this need and the inability of the western States to redress it, Congress enacted the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, which directed the Secretary to reclaim certain lands through irrigation projects and then to restore the lands to entry for development. The funding for the initial projects came from the Reclamation Fund, which was established with the proceeds from the sales of public lands.

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[12] Neither the Secretary nor the Tribe appealed from these holdings. Consequently, little attention was focused upon this issue in the briefs and at oral argument before the Court of Appeals.

[13] In two parts of its opinion (App. 4a, 5a), the court purported not to be finally deciding the issue. In a third part (App. 8a), however, the issue was squarely and finally decided. Moreover, the Secretary is acting and will continue to act on the basis of this ruling. It is, therefore, clearly before this Court for decision.

Congress intended that the Fund be constantly replenished through payments made under reimbursement contracts with the water users. *See Swigart* v. *Baker*, 229 U.S. 187, 194, 197 (1913) (maintenance costs are properly chargeable to water users).

During the last half-century, Congress has expanded the reclamation program beyond its original focus on irrigation. The Wayne Aspinall Project Act is an example of this expanded coverage. Congress legislated the following uses for Stampede Dam: flood control, irrigation, storage against drought, power generation, development of fish and wildlife resources, and other beneficial purposes. 43 U.S.C. § 614.

Despite the enlargement of congressional directives, the reimbursement obligation has remained constant throughout the years. As part of the authorization procedure for new projects, the Secretary is required to identify those portions of a new project's costs for which reimbursement can be obtained from water users. Specifically, the Secretary must delineate what part of the project's costs can be allocated to irrigation, power, and M&I users that will "*probably be repaid by the water users*" or "*returned to the United States.*" 43 U.S.C. § 485h(a) (emphasis added). If all of the project's costs will be repaid, then the project is automatically authorized without further action by Congress. But if a portion of the project is for non-reimbursable uses, such as recreation or fish and wildlife development, then the Secretary cannot proceed until Congress has approved the expenditure of funds for the non-reimbursable uses. Thus, the clear import of the Section 485h(a) authorization procedure is to assure that Congress is notified and approves any non-reimbursable features of a project before it is constructed. This mandate obviously would be thwarted if, after congressional approval is given with the expectation of substantial repayment, the Secretary can then decide to operate the project exclusively for non-reimbursable purposes.

The Secretary's allocation of the Washoe Project's costs contemplated that 86% of the Project's total costs of construction, operation, and maintenance would be repaid to the United States.[14] Based on the Secretary's feasibility report, Congress anticipated that the major portion of the Project's costs would be recouped through reimbursement contracts. *See* 102 Cong. Rec. 7040, 12,229 & 13,939 (1956). The Ninth Circuit, however, overlooked the legislative history of the Washoe Project Act and judicially rewrote the statute, deleting the reimbursement obligation and the $2 million limitation for the fishery. Its ruling is inconsistent with the statutory scheme of the federal reclamation laws generally and portends serious consequences not only in this case but in many other reclamation projects where the Secretary is authorized to proceed with construction before entering into a repayment contract.[15] The Appendix includes a partial list of reclamation projects fitting this description. App. 150a. The Court of Appeals' decision allows the Secretary to operate Stampede (and many other projects) *exclusively* for non-reimbursable purposes, despite congressional intent that 86% of Stampede's costs be reimbursed by water users.

Congress has consistently required that those who directly benefit from federal reclamation projects bear most of the associated costs. This reimbursement obligation has been implicit since the enactment of the 1902

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[14] The remaining 14% represents $2 million allocated to development of fish and wildlife resources, $6.1 million to flood control, and $100,000 to recreation, all of which are non-reimbursable uses.

[15] The Court of Appeals confused the general obligation to obtain reimbursement for construction and operation costs with the point at which repayment contracts must be executed. App. 5a. Stampede was constructed before contracts were executed because of the need for immediate flood control and protection in Truckee Meadows. That Congress chose to leave the timing open does not relieve the Secretary of the obligation under reclamation law generally to obtain reimbursement.

Reclamation Act. The Ninth Circuit's decision—squarely in the face of the Secretary's concession to the contrary—has a serious budgetary impact and will imperil the construction of new reclamation projects in the future.

CONCLUSION

For each of the reasons above, petitioners respectfully request the Court to grant the writ and reverse and remand the decision of the court below.

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